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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. BRANDON BUCKLEY, Appellant.	)	2 CA-CR 2009-0148 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200800481

Honorable James L. Conlogue, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 Brandon Buckley appeals from his convictions and sentences for second-degree murder and three counts of aggravated assault. He argues the evidence against him was insufficient to support his convictions and contends the trial court improperly instructed the jury on transferred intent and flight. Finding no error, we affirm his convictions and sentences.

Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts. *See State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003). On November 20, 2009, the four victims—Marc, Darnell, Scott, and Jasmine—were at the Mountain View Apartments in Sierra Vista, visiting a woman named Natasha. Natasha told Buckley on the telephone that "friends" were at her apartment. And, because she had said "Hollywood," referring to Marc and Darnell, she believed Buckley knew which people were there. Buckley's girlfriend Sandy was in a car with Buckley when he received a call on his cellular telephone, and she heard him say, "[T]hey are in the apartment, or they are somewhere. They are there." Buckley then called another person and repeated this information.

¶3 Sandy and Buckley later went to the Plaza Apartments with their friends Shanna, Eddie, Janet, and Putt, and accomplices Thaddeus and Taurus Crawford. Thaddeus had a revolver in his waistband when he, Taurus, and Buckley left the Plaza Apartments at approximately the same time. Buckley left in Sandy's car.

¶4 Shortly after midnight on November 21, Natasha left her apartment and saw several people coming over a wall into the parking lot of the Mountain View Apartments.

She recognized one person as someone she had seen with Buckley. Jasmine, Scott, Darnell, and Marc also left Natasha's apartment and, as they got into their vehicles, were "ambushed" by assailants shooting guns. Jasmine was in the driver's seat of her van when she heard shattering glass and gunfire all around her. Scott was getting into his car when one of the assailants hit him in the head with a pistol, causing a gash on his forehead and rendering him unconscious. An assailant also wrestled with Darnell, who was ultimately shot three times in the back.

¶5 Marc, who had been in Scott's car, was killed by a gunshot wound to the chest and also sustained a gunshot wound to the leg. An autopsy showed Marc's injuries had been caused by a rifle or handgun loaded with high-velocity ammunition. Officers determined that three weapons had been fired in the incident: a rifle, a .45-caliber revolver, and a .40-caliber semiautomatic pistol. The weapon that fired the .45-caliber bullets was not recovered, but police officers found in bushes at the Plaza Apartments a box of .45-caliber bullets consistent with bullets recovered from Jasmine's van.

¶6 About an hour after Buckley, Thaddeus, and Taurus had left the Plaza Apartments, Taurus returned in a panic and said Thaddeus had been shot. Emergency personnel found Thaddeus near the crime scene. Buckley returned to the Plaza Apartments later and told Sandy her car was at the Mountain View Apartments. He asked her to see, when she went to pick it up, "if there was [sic] any cops walking behind the doctors['] offices," which were located nearby. Buckley later asked Sandy to retrieve a gun he had put in a trash can behind the doctors' offices. She testified she had looked for the gun but could not find the trash can. Police officers located a semiautomatic rifle

in a dumpster in an alleyway close to the offices. Buckley left Arizona afterwards and eventually was arrested in Georgia.

¶7 The state charged Buckley with first- and second-degree murder of Marc, attempted first-degree murder of Darnell, and three counts of aggravated assault with a deadly weapon upon Darnell, Scott, and Jasmine. A jury found him guilty of second-degree murder and three counts of aggravated assault, and it found the aggravated assault convictions to be dangerous-nature offenses. The trial court sentenced Buckley to consecutive, presumptive terms of imprisonment totaling 38.5 years, and this appeal followed.

Discussion

Rule 20 Motion

¶8 Buckley first contends the trial court improperly denied his motion for a judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P., arguing there was insufficient evidence to support each of his four convictions. Buckley moved for a judgment of acquittal at the close of the state's case and renewed his request in a post-verdict motion seeking acquittal or, in the alternative, a new trial under Rule 24.1, Ariz. R. Crim. P. The trial court denied these motions.

¶9 Although the parties agree and we have often stated that "we review the [trial] court's denial of a Rule 20 motion for an abuse of discretion," *State v. Leyvas*, 221 Ariz. 181, ¶ 33, 211 P.3d 1165, 1175 (App. 2009); *see, e.g.*, *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d 1046, 1056 (App. 2007), we note that in *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993), our supreme court stated that "we conduct a

de novo review of the trial court's decision [on a Rule 20 motion]." "[W]e are bound by decisions of the Arizona Supreme Court and have no authority to overrule, modify, or disregard them." *City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993). Thus, our review is de novo. Our review also is deferential, however, because, as the court stated in *Bible*, we "view[] the evidence in a light most favorable to sustaining the verdict[s]." 175 Ariz. at 595, 858 P.2d at 1198.

¶10 A trial court must grant a Rule 20 motion "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a); *see also Leyvas*, 221 Ariz. 181, ¶ 33, 211 P.3d at 1175. Substantial evidence is that which reasonable minds could consider sufficient to establish the defendant's guilt beyond a reasonable doubt. *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). "To set aside a jury verdict for insufficient evidence[,] it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

Second-Degree Murder

¶11 A person commits second-degree murder if, without premeditation, he causes the death of another either: (1) intentionally; (2) knowing his conduct would cause death or serious injury; or (3) by consciously disregarding a substantial and unjustifiable risk that his actions would create a grave risk of death, under circumstances manifesting extreme indifference to human life. *See* A.R.S. § 13-1104(A).

¶12 There was sufficient evidence to support the jury's conclusion that Buckley was an accomplice in Marc's death. On the night of the incident, Buckley had received

and made telephone calls referring to people being in the apartment. Buckley, Taurus, and Thaddeus, who was armed with a revolver, left the Plaza Apartments within minutes of each other, and Buckley left in Sandy's car, which he then left at the Mountain View Apartments.

¶13 Marc was killed by a gunshot wound to the chest that was consistent with a rifle or handgun loaded with high-velocity ammunition. And Buckley had asked Sandy to retrieve a gun from the same location where officers located a semiautomatic rifle. The grip of the rifle included DNA[1] from at least three people, and the DNA profiles of Buckley and Thaddeus could not be excluded as matches. From this evidence, jurors could reasonably conclude that Buckley or one of his accomplices had intentionally, knowingly, or recklessly caused Marc's death by inflicting a gunshot wound.

Aggravated Assault

¶14 The charges for the aggravated assaults of Darnell and Scott required proof that Buckley or an accomplice had "[i]ntentionally, knowingly or recklessly caus[ed] . . . physical injury to another person," A.R.S. § 13-1203(A)(1), while using a deadly weapon or dangerous instrument, A.R.S. § 13-1204(A)(2). Darnell testified he had seen one of the assailants hit Scott in the head with a pistol, causing a gash on his forehead and rendering him unconscious. Darnell also saw muzzle flashes before one assailant wrestled with him, and Darnell was shot three times in the back. From this evidence, the jurors could reasonably conclude Buckley or his accomplices had committed aggravated

[1]Deoxyribonucleic acid.

assault by physically injuring Scott and Darnell with a deadly weapon or dangerous instrument. *See* §§ 13-1203(A)(1), 13-1204(A)(2).

¶15 The charge for the aggravated assault of Jasmine required proof that Buckley or an accomplice had "[i]ntentionally plac[ed] [her] in reasonable apprehension of imminent physical injury," § 13-1203(A)(2), while "us[ing] a deadly weapon or dangerous instrument," § 13-1204(A)(2). "[A] defendant's intent to cause reasonable apprehension of imminent physical injury in the victim can be inferred from the evidence." *State v. Salman*, 182 Ariz. 359, 362, 897 P.2d 661, 664 (App. 1994). "[I]f the evidence demonstrates the 'likely presence' of another person and that the defendant intended to do the act, a jury may infer that the defendant intended to cause reasonable apprehension of imminent physical injury." *Id.* at 363, 897 P.2d at 665.

¶16 Jasmine was in the driver's seat of the van when the victims were "ambushed" and shots were fired at the van from within ten or eleven feet. She was aware she could be shot as bullets broke van windows, entered through an open passenger door, and lodged in the interior of the van. *See State v. Valdez*, 160 Ariz. 9, 11, 770 P.2d 313, 315 (1989) (fear or apprehension as element of offense can be established by circumstantial evidence; victim's testimony not required), *overruled on other grounds by Krone v. Hotham*, 181 Ariz. 364, 890 P.2d 1149 (1995). Reasonable jurors could infer Buckley and his accomplices intentionally placed Jasmine in reasonable apprehension of imminent physical injury when they shot into the vehicle where she was seated.

¶17 Because reasonable jurors could fairly differ on the inferences to be drawn from the state's evidence, the trial court was required to submit the case to the jury and

had no discretion to grant Buckley's motion for acquittal. *See State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993) ("[I]f reasonable minds can differ on inferences to be drawn [from the evidence], the case must be submitted to the jury.").

Transferred-Intent Instruction

¶18 Buckley next contends the trial court improperly instructed the jury, over his objection, on the elements of transferred intent.[2] According to Buckley, "[u]nder the facts of this case, one cannot conclude beyond a reasonable doubt that the verdict was not based on improper transfer of intent as it applies to the aggravated assault charges." Although he asserts the court should have clarified for the jury when and how they could apply transferred intent and contends the failure to do so was reversible error, he does not claim to have requested any such clarification or limiting instruction by the trial court below. Absent fundamental error, a defendant generally waives his objection if he fails

[2]The court instructed the jury:

> If intentionally causing a particular result is an element of an offense and the actual result is not within the intention or contemplation of the person, that element is established if:
>
> > 1. The actual result differs from that intended or contemplated only in the respect that a different person or different property is injured or affected, or that the injury or harm intended or contemplated would have been more serious or excessive than that caused; or
> >
> > 2. The actual result involved similar injury or harm as that intended or contemplated and occurs in a manner in which the person knows or should have known is rendered substantially more probable by such person's conduct.

to ask for limiting instructions. *State v. Ellison*, 213 Ariz. 116, ¶ 61, 140 P.3d 899, 916 (2006).

¶19 Buckley now argues that the jury "was at liberty to consider whether the instruction also applied to [the other victims] in reaching their verdicts,"[3] and, relying on *State v. Johnson*, 205 Ariz. 413, 72 P.3d 343 (App. 2003), asserts the jury may have improperly found him guilty of placing victims in apprehension of imminent physical injury even if his intent was "solely to cause injury or death." At trial, however, although Buckley objected to the instruction, he did not base his argument to the court on *Johnson* and has therefore forfeited all but fundamental error review. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). And because he has not argued on appeal that the alleged error was fundamental, or that it prejudiced him, he has not sustained his burden of persuasion in fundamental error review. *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

¶20 Although we will not ignore fundamental error if it is apparent, *see State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007), no such error is apparent here. At the close of the case, the state argued specifically that the transferred-intent instruction applied to the murder charge, explaining that the instruction meant simply that the state did not have to prove "whom they were trying to kill." Because we consider the transferred-intent instruction in conjunction with the closing arguments of counsel, *State*

[3]Buckley's brief wrongly asserts that "the State argued the transferred intent instruction only applied to Jasmine." We note the record reflects the state's closing argument was "[t]he transferred intent instruction means simply that the State doesn't have to prove whom they were trying to kill with respect to the murder charge."

v. Valverde, 220 Ariz. 582, ¶ 16, 208 P.3d 233, 237, *cert. denied*, ___ U.S. ___, 130 S. Ct. 640 (2009), and because counsel specifically told the jury the instruction was applicable to the murder charge, we conclude Buckley suffered no prejudice due to jury confusion over the transferred-intent instruction.

¶21 We consider the transferred-intent instruction in light of all the instructions. *See State v. Hoskins*, 199 Ariz. 127, ¶ 75, 14 P.3d 997, 1015 (2000). Here the court instructed the jury:

> You must consider all these instructions. Do not pick out one instruction, or part of one, and ignore the others. As you determine the facts, however, you may find that some instructions no longer apply. You must then consider the instructions that do apply, together with the facts as you have determined them.

We presume the jurors followed the court's instructions. *State v. Morris*, 215 Ariz. 324, ¶ 55, 160 P.3d 203, 216 (2007). The court did not err when it instructed the jury on transferred intent.

Flight Instruction

¶22 Buckley next contends the trial court erred in giving a flight instruction.[4] As stated above, we review for an abuse of discretion a trial court's decision to give a

[4]The trial court instructed the jury:

> In determining whether the State has proved the defendant guilty beyond a reasonable doubt, you may consider any evidence of the defendant's running away, hiding or concealing evidence, together with all the other evidence in the case. Running away, hiding or concealing evidence after a crime as been committed does not by itself prove guilt.

particular instruction, and "[a] party is entitled to an instruction on any theory reasonably supported by the evidence." *Johnson*, 205 Ariz. 413, ¶ 10, 72 P.3d at 347.

¶23 Before giving a flight instruction, a court must determine whether the evidence "supports a reasonable inference that the flight or attempted flight was open, such as the result of an immediate pursuit." *State v. Smith*, 113 Ariz. 298, 300, 552 P.2d 1192, 1194 (1976). If the flight or attempted flight was not open, "the evidence must support the inference that the accused utilized the element of concealment or attempted concealment." *Id.* An instruction on flight is appropriate "when the defendant's conduct manifests a consciousness of guilt." *State v. Speers*, 209 Ariz. 125, ¶ 27, 98 P.3d 560, 567 (App. 2004). "Leaving the state justifies a flight instruction as long as it invites some suspicion of guilt. Immediate pursuit or concealment, though sufficient, is not necessary." *State v. Thornton*, 187 Ariz. 325, 334, 929 P.2d 676, 685 (1996) (citation omitted); *see also State v. Earby*, 136 Ariz. 246, 249, 665 P.2d 590, 593 (App. 1983) (circumstances surrounding defendant's leaving state supported inference that flight reflected consciousness of guilt).

¶24 Buckley, who left the state after these crimes, argues the state did not present evidence about the manner in which he left, so there is no evidence to support either a finding of open flight or a suspicion of guilt. But a witness named Connie, who got her drugs from Buckley, testified she had called him on the night of the crimes and he had requested a ride home when he called her back. While in her car, Buckley received a telephone call and told the frantic caller he "would get him out of there." At Buckley's

request, Connie had picked up Taurus and another man at the Plaza Apartments and had driven them around to find a hotel that would accept them.

¶25 Later, as noted above, Buckley informed Sandy that her car was at the Mountain View Apartments and asked that she check for police officers nearby when she went to get it. He also requested that she retrieve a gun from a trash can in the area. After getting her car from the apartment complex, Sandy picked up Taurus from a hotel and dropped him off at a bus station in Benson. Buckley also asked Sandy to drive him to Hereford, where he dropped off a bag of clothes. Connie testified that, after the night of the crimes, she was no longer able to contact Buckley by telephone, as she had done two or three times per week in the past, and had not seen him in town. Likewise, when Sierra Vista police officers decided to talk to Buckley after the crimes, they were unable to find him at a location where he had a scheduled appointment and, later, were unable to locate him to arrest him on these charges. Buckley eventually was arrested in Georgia.

¶26 Taken as a whole, this evidence amply supports an inference that Buckley's flight manifested consciousness of guilt. *See Speers*, 209 Ariz. 125, ¶¶ 27-28, 98 P.3d at 567-68; *Thornton*, 187 Ariz. at 334, 929 P.2d at 685; *Earby*, 136 Ariz. at 249, 665 P.2d at 593. It was up to the jury to decide whether to infer guilt from this evidence. *See Earby*, 136 Ariz. at 248, 665 P.2d at 592. The court did not abuse its discretion in giving the flight instruction.

Disposition

¶27 Buckley's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge